Supreme Court, U.S.
FILED
FEB 16 1999
CLERK

No. 98-751

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

Hecla Mining Company,

Petitioner,

v.

Washington Wilderness Coalition, Okanogan Highlands Alliance,
and Atlantic States Legal Foundation, Inc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER HECLA MINING COMPANY

Mark Wielga
Counsel of Record
Scott W. Hardt
Dorsey & Whitney, LLP
370 Seventeenth Street, Suite 4400
Denver, CO 80202
(303)629-3400
Counsel for Petitioner

12 pp

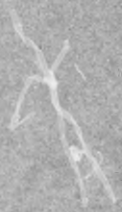

TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. THE PARTIES AND AMICI CURIAE AGREE THAT THE ISSUE PRESENTED IN THE PETITION IS OF NATIONAL SIGNIFICANCE 2

II. RESPONDENTS' ARGUMENT ON THE MERITS IS UNPERSUASIVE 4

A. Although Rejected By Both the District and Appellate Courts, Respondents Continue To Argue Their "Factual" Case. 4

B. Respondents Have Mischaracterized Petitioner's Analysis 5

C. Respondents Suggest Incorrectly That the Ninth Circuit's Dual Standard Is Consistent with Supreme Court Precedent 7

D. Respondents' Ratification Theory Is Insupportable 9

E. The Legislative History Does Not Support Respondents' Position 9

CONCLUSION 10

TABLE OF CITED AUTHORITIES

Cases

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) 5-7

Fogerty v. Fantasy, Inc.,
510 U.S. 517 (1994) 6, 8

Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546 (1986) 8

Razore v. Tulalip Tribes of Washington,
66 F.3d 236 (9th Cir. 1995) 6

SUMMARY OF ARGUMENT

Both the Respondents and Amici Curiae emphasize that the issue raised by Hecla Mining Company ("Hecla") is one of great national importance, and that its resolution by this Court will have a substantial impact on the course of litigation arising under federal environmental laws, such as the Clean Water Act ("CWA") and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). Given the pervasiveness of such litigation, the Court's decision in this case will impact essentially every industrial sector of the U.S. economy.

Turning to Respondents' arguments on the merits, Respondents mischaracterize Hecla's position, and this Court's analysis in other attorneys fee cases. Respondents' argument boils down to the untenable propositions that the plain language of the CWA and CERCLA should be ignored, and that because federal environmental laws supposedly serve the same purposes as the federal civil rights laws, they should be interpreted identically. However, the unique role played by plaintiffs seeking to enforce their rights under the civil rights laws is unmatched by the role of environmental groups seeking to litigate under the federal environmental laws. Consequently, given the plain language of the CWA and CERCLA, and the distinct purposes served by those laws, there is no defensible reason to treat prevailing plaintiffs and defendants who seek recovery of their attorney fees under these statutes in the dramatically disparate manner dictated by the Ninth Circuit's dual standard.

Because there is complete agreement among the parties that the issue presented in the Petition is of great importance, and because the Ninth Circuit's decision departs from sound legal analysis, Hecla's Petition should be granted.

ARGUMENT

I. THE PARTIES AND AMICI CURIAE AGREE THAT THE ISSUE PRESENTED IN THE PETITION IS OF NATIONAL SIGNIFICANCE

The CWA and CERCLA are two of the most ubiquitous federal environmental laws. See, e.g., Amici Curiae Brief, pp. 3-4. Respondents concur with Hecla that the interpretation of the attorney fee provisions of these statutes is of great significance. Respondents agree that the operation of these provisions dramatically impacts how environmental citizen suit provisions are utilized by environmental organizations and other citizens. Respondents conclude that the dual standard applied by the U.S. Court of Appeals for the Ninth Circuit creates significant incentives for bringing private citizen suits under federal environmental laws, and that an interpretation that allowed district courts greater discretion to award fees to prevailing defendants would substantially affect decisions as to when and whether such suits would be brought. Brief of Respondents in Opposition to Petition for Writ of Certiorari ("Opposition"), pp. 9, 17.

The conclusion that this is an important national issue is echoed by Amici Curiae Chamber of Commerce of the United States of America, National Association of Manufacturers, National Mining Association, Corporate Environmental Enforcement Council, American Forest and Paper Association, Inc., and Alaska Mining Association. These amici curiae represent a broad cross-section of industries and business owners in this country, who are impacted by environmental citizen suits. Amici Curiae Brief, pp. 1-2. As the amici point out, the issue raised by Hecla is important to hundreds of thousands of businesses in this country since the interpretation of the attorneys fee provisions under the federal environmental laws not only

influences what suits will be brought, but also dramatically impacts the manner in which citizen suits are defended. Id. at 13-17.

Respondents do not dispute that there has been a substantial increase in the number of citizen suits brought in recent years under federal environmental laws, such as the CWA and CERCLA. Opposition, p. 5, n. 7. Respondents suggest only that if the majority of these suits were won by plaintiffs, this rise in litigation would be beneficial and consistent with Congress' intent. Id However, Respondents provide no basis for even suggesting that such are the facts. Instead, as discussed in the Brief of Amici Curiae, and as evidenced by the few reported cases arising under the federal environmental laws that have gone to trial, the vast majority of such suits settle out of court. Amici Curiae Brief, pp. 14-15. The mere fact that defendants have settled these cases given the strong disincentives to defend lawsuits created by the dual standard for attorney fee awards, is not evidence that the purposes of federal environmental statutes are being furthered. To the contrary, the widespread settlement of such cases suggests that the cost of settling even "winnable" cases is increasingly being treated as a cost of doing business in this country. While this may provide a de facto lawyer employment fund financed by consumers of products manufactured in this country, that certainly was not Congress' intent in enacting federal environmental statutes such as the CWA and CERCLA.

Because the interpretation of the attorney fee shifting provisions under the CWA and CERCLA is a significant issue that affects a broad cross-section of society, Hecla's Petition for Writ of Certiorari should be granted.

II. RESPONDENTS' ARGUMENT ON THE MERITS IS UNPERSUASIVE

A. Although Rejected By Both the District and Appellate Courts, Respondents Continue To Argue Their "Factual" Case.

In an attempt to persuade this Court that what the Ninth Circuit did in this case was acceptable regardless of whether a dual standard properly applies, Respondents reiterate many of their factual allegations that were rejected by the lower courts. See, e.g., Opposition, pp. 1-3. In the end, Respondents ask this Court to believe that their suit served an important role in somehow eliminating a substantial source of pollution that the State of Washington was ignoring. Id. at 2.

The lower courts recognized that Respondents' characterization is untrue. As summarized in Hecla's Petition, the State of Washington was closely regulating Hecla's historic mine site and had directed Hecla to cease all discharges in accordance with a specific schedule. Petition, p. 6. As a result, the Respondents' suit could not possibly serve any environmental protection purpose, and was brought solely to further penalize Hecla by seeking additional exactions, including fees for Respondents' lawyers. Apparently recognizing that there was nothing more that could be done to protect the environment, Respondents dropped their claim for injunctive relief prior to trial. Petition, p. 7.

Contrary to Respondents' suggestion that this is a case where attorney fees were properly denied, even if the Ninth Circuit's dual standard is inappropriate, this case exemplifies the types of circumstances that district courts should be permitted to consider in evaluating whether to award attorney fees to a prevailing defendant. The Ninth

Circuit's dual standard improperly prohibits such an evaluation.

B. Respondents Have Mischaracterized Petitioner's Analysis

In a misguided effort to minimize Hecla's position, Respondents suggest that Hecla is arguing that prevailing plaintiffs and prevailing defendants should always be treated identically for purposes of awarding fees. Opposition, p. 8. That is not Hecla's position. As detailed in its Petition, it is Hecla's position that, in accordance with the plain language of the CWA and CERCLA, and Congress' intent in enacting those statutes, district courts should have discretion in determining whether a prevailing defendant should be awarded fees based upon its evaluation of the particular facts of the case before it. What Hecla objects to is the Ninth Circuit's dual standard which narrowly circumscribes the circumstances under which a district court may award attorney fees to a prevailing defendant, and prohibits district courts from considering most of the facts before it. Consequently, Respondents' argument that this Court has rejected a single "mechanical" standard for awarding attorney fees to prevailing plaintiffs and defendants under Title VII is irrelevant. Opposition, p. 8 (discussing Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)).

Attempting to further "radicalize" Hecla's position, Respondents repeatedly suggest that under Hecla's analysis, district courts would have "uncontrolled" or "unlimited" discretion in awarding fees, and would be free to ignore Congress' purposes in enacting the CWA and CERCLA. Opposition, pp. 5, 6, 17, 18. Again, Respondents' characterization of Hecla's argument is misleading. Hecla argues that the dual standard adopted by the Ninth Circuit is contrary to the purposes of the CWA and CERCLA, and

that district courts should be free to consider other factors that are consistent with Congress' purposes. In both this case and in Razore v. Tulalip Tribes of Washington, 66 F.3d 236 (9th Cir. 1995), the Ninth Circuit summarily adopted the Christiansburg dual standard that this Court employed to further Congress' specific purposes in enacting Title VII of the Civil Rights Act. The Ninth Circuit never even considered Congress' purposes in enacting the CWA or CERCLA.

What Hecla challenges in its Petition, is the Ninth Circuit's thoughtless transferral of a standard from the civil rights context to the realm of federal environmental regulation, which serves a dramatically different purpose in American society. Both Hecla and Amici Curiae have elaborated on the many differences between civil rights laws and federal environmental laws, such as the CWA and CERCLA. Petition, pp. 15-20; Amici Curiae Brief, pp. 10-14. Given those differences, there is no justification for applying Christiansburg's dual standard to the CWA and CERCLA. However, that does not mean that district courts may ignore the purposes of those statutes in exercising their discretion to award fees. Obviously, the purpose of the underlying statute is a factor the district courts should consider. Hecla's position is entirely consistent with this Court's analysis in Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994), wherein the Court rejected transferral of Christiansburg's dual standard to another statutory context, but pointed out that Congress' statutory purposes are still relevant. In identifying some of the factors a district court may consider when exercising its discretion to award fees to a prevailing defendant under the Copyright Act, the Court pointed out that consideration of a range of factors is appropriate "so long as such factors are faithful to the purposes of the Copyright Act." 510 U.S. at 535, n. 19.

Contrary to Respondents' suggestion that Hecla would throw out the baby with the bathwater, the purposes of the CWA and CERCLA would remain important to a court's analysis in the absence of a dual standard. The issue before this Court is not whether federal district courts should have "unlimited" discretion to award attorney fees to prevailing defendants, but whether they should have discretion to weigh all of the facts before them, in light of the purposes Congress sought to promote in enacting the particular statute at issue.

C. Respondents Suggest Incorrectly That the Ninth Circuit's Dual Standard Is Consistent with Supreme Court Precedent

Respondents are incorrect in suggesting that the Ninth Circuit's importation of a dual standard into the CWA and CERCLA is consistent with Supreme Court precedent. Respondents state that, in Christiansburg, this Court held that a dual standard for attorneys fee awards should apply to all statutes in which citizen plaintiffs act as private attorneys general. Opposition, p. 7. There is simply nothing in Christiansburg whatsoever to suggest that the Court's holding had such breadth. Instead, Christiansburg's holding was narrowly tailored based upon a detailed analysis of Congress' intent in enacting Title VII of the Civil Rights Act. 434 U.S. at 418-22.

The differences between the purposes of Title VII, and the CWA and CERCLA are many. For example, as Respondents highlight, a primary reason for this Court's adoption of a dual standard under Title VII was its conclusion that individual plaintiffs were "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' " Opposition, pp. 8-9 (quoting, Christiansburg, 434 U.S. at 418). However, as

discussed by Hecla and Amici Curiae, Congress determined that the federal and state governments were to have primary enforcement authority under the CWA and CERCLA, and that citizens were to play a secondary, supportive role. Petition, p. 17; Brief of Amici Curiae, pp. 12-13. Thus, in contrast to the civil rights laws, Congress' intent in enacting the citizen suit provisions of the CWA and CERCLA was "more complex, more measured than simply maximizing the number" of suits brought.[1] Fogerty, 510 U.S. at 526.

Respondents now ask this Court to ignore the delicate balance that Congress struck under the CWA and CERCLA, whereby Congress sought to control and limit pollution caused by industry, while ensuring the continued economic viability of this country. Unlike the Civil Rights Act, where Congress determined that no discriminatory behavior is appropriate, Congress has recognized that some "pollution" is a necessity in contemporary society. Providing some incentive for businesses to actively defend questionable citizen suits, rather than simply passing on the costs of a quick settlement to consumers as a cost of doing business in this country, fully promotes Congress' purposes in enacting the CWA and CERCLA.

---

[1] Citing Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 546 (1986), Respondents suggest that this Court has already held that the citizen suit provisions of federal environmental statutes and civil rights statutes should be interpreted the same. Opposition, pp. 14-15. That is incorrect. In Delaware Valley, the court compared these areas of law in considering only whether fees could be recovered by a prevailing plaintiff for time spent in certain administrative activities. The court did not in any way consider the issue presented here, or the unique roles that citizen plaintiffs play under the two statutory schemes.

D. Respondents' Ratification Theory Is Insupportable

Respondents' suggestion that Congress somehow ratified use of a dual standard under the CWA and CERCLA is untenable. Plaintiffs assert that by expressly incorporating a dual standard in the Pipeline Safety Act of 1976, Congress was somehow acknowledging that every time it used the very different language authorizing a fee award "whenever appropriate," it was really intending to apply a dual standard. Opposition, pp. 12-13. That suggestion is ridiculous. Congress' enactment of the Pipeline Safety Act in 1976 shows that Congress knew how to spell out a dual standard when it intended such a standard to apply. When Congress subsequently enacted CERCLA in 1980, it did not use dual standard language even though it had clearly done so in prior legislation where it intended such an interpretation. Congress' decision not to use express dual standard language in CERCLA or when it amended the CWA demonstrates its intent that a dual standard not apply.

E. The Legislative History Does Not Support Respondents' Position

Respondents argue that the legislative history of the CWA and CERCLA support application of a dual standard, because Congress acknowledged that a defendant would be protected from frivolous suits by the attorney fee recovery provisions. Opposition, pp. 17-21. However, rather than suggesting that prevailing in a frivolous lawsuit is the only situation where a defendant could recover its attorney fees, Respondents' selected references merely suggest that is one circumstance where a prevailing defendant is entitled to its fees.

That Congress believed the attorney fee recovery provisions would protect defendants from frivolous suits in no way supports a conclusion that there are no other circumstances under which a prevailing defendant should be allowed to recover its fees. This Court clearly acknowledged that in Fogerty, 510 U.S. at 535, n. 19. In rejecting application of a dual standard under the Copyright Act, the Court acknowledged that there are several factors that a district court should consider in determining whether an attorney fee award to a prevailing defendant is appropriate. Id. The Court stated that such factors include frivolousness, as well as motivation, objective unreasonableness, and the need in particular circumstances to advance considerations of compensation and deterrence. Id. Thus, the recognition that frivolousness is one factor that a district court may consider in determining whether attorney fees are appropriate for a prevailing defendant in no way indicates that a narrow dual standard applies under which that is the only circumstance when fees may be awarded.

CONCLUSION

For the reasons stated above, in Hecla's Petition and in the Brief of Amici Curiae, Hecla's Petition For Writ of Certiorari should be granted.

Respectfully submitted,

MARK WIELGA
Counsel of Record
SCOTT W. HARDT
DORSEY & WHITNEY LLP
370 17TH STREET, SUITE 4400
DENVER, CO 80202
(303) 629-3400
Counsel for Petitioners

Dated:
February 12, 1999